A three-judge District Court was convened, consisting of Judge Paul R. Hays of the Court of Appeals for the Second Circuit and Judges John M. Cannella and Murray I. Gurfein of the District Court. No discovery or trial was had. The case was briefed and argued to the court on July 6, 1972.

On July 21, 1972, the District Court handed down a per curiam opinion that Section 1 of Chapter 414 violates the Establishment Clause. Thereafter, on October 2, 1972, Judge Gurfein handed down an opinion, concurred in by Judge Cannella, explaining in detail the reasons for the court's conclusion with respect to Section 1. The opinion further concludes that Section 2 is violative of the Establishment Clause. On the other hand, the court concluded that the tax modification part of Chapter 414 (§§ 3-5) "is not in conflict with the First Amendment Establishment Clause, as applied to the states through the Fourteenth Amendment." 350 F.Supp. at 673; JSA, p. 38a. Judge Hays concurred with respect to Sections 1 and 2, but dissented with respect to Sections 3-5. Judgment was entered, permanently enjoining enforcement of Sections 1 and 2, while granting defendants' and intervenor-defendants' motion for summary judgment dismissing the complaint with respect to Sections 3, 4 and 5. *See* JSA, pp. 48a-51a.

Pearl appealed from so much of the judgment as dismissed its complaint with respect to Sections 3-5. Docket No. 72-694. The defendant state officials and Senator Brydges separately appealed from that part of the judgment permanently enjoining enforcement of Sections 1 and 2.[4] Docket Nos. 72-791 and 72-753. Appellants Cherry, Ferguson and Ruiz appealed from so much of the judgment

[4] Senator Brydges's position as Majority Leader and President Pro Tem has since been assumed by Senator Warren M. Anderson, who has been duly substituted as a party herein.

as declares that Section 2 of Chapter 414 violates the Establishment Clause and permanently enjoins its enforcement.[5] Docket No. 72-929. This Court's order of January 22, 1973, noting probable jurisdiction, consolidated all four appeals. *See* Appendix, p. 80a.

[5] The parents who intervened in the District Court in support of the constitutionality of Sections 2-5 of Chapter 414 had no standing to intervene in support of Section 1 and thus to appeal from the judgment thereon. The question of the constitutionality of that section is therefore not specifically dealt with in this brief.

Summary of Argument As to Limited Tax Relief*

Section 5 of Chapter 414 provides for a modification of adjusted gross income which is materially dissimilar to a tax exemption or tax credit and is not an ordinary deduction. The principal effect of this provision is to alleviate somewhat the burden on certain taxpayers who choose to pay to send their children to nonpublic schools.

State legislatures have broad discretion to make classifications and distinctions in the exercise of their taxing powers, and this Court has always recognized this so long as the legislation has a rational basis. Section 5 has a number of rational bases, including the giving of some recompense by way of tax relief to taxpayers who bear their share of the burden of maintaining public education and yet send their children to nonpublic school, the holding down of the tax burden on all taxpayers and the maintaining of public education at at least its present level.

Section 5, as the District Court majority concluded, has a secular purpose and primary effect and is devoid of any state entanglement with religion. Since this Court concluded in *Walz* v. *Tax Comm'n of the City of New York*, 397 U.S. 664 (1970), that exemption of churches from taxation does not constitute an establishment of religion, Section 5, which provides a limited tax benefit to individual taxpayers who have relieved the state (and other taxpayers) of the burden of educating their children, cannot be so interpreted. There is no genuine nexus between slight tax relief under such circumstances and establishment of religion.

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* The Summary of Argument with respect to tuition reimbursement (Section 2 of Chapter 414) is set forth at page 22, *infra*.

ARGUMENT AS TO LIMITED TAX RELIEF

THERE IS NO GENUINE NEXUS BETWEEN MODIFICATION OF THE ADJUSTED GROSS INCOMES OF INDIVIDUAL TAXPAYERS PURSUANT TO SECTION 5 AND ESTABLISHMENT OF RELIGION

The District Court's majority opinion sets forth five specific reasons for its conclusion that the tax modification part of Chapter 414 (§§ 3-5) is not in conflict with the Establishment Clause, to wit:

> . . . In the first place, it . . . covers attendance at *all* nonprofit private schools *in the State.*
>
> Second, it does not involve a subsidy or grant of money *from the State Treasury* . . .
>
> Third, it has a particular secular intent—one of equity—to give some recompense by way of tax relief to our citizens who bear their share of the burden of maintaining the public schools and who, because of religious belief or otherwise, send their children to nonpublic full-time schools, as is their constitutional right. . . .
>
> Fourth, the benefit to the parochial schools, if any, is so remote as not to involve impermissible financial aid to church schools.
>
> Lastly, there is a minimum of administrative entanglement with the nonpublic schools. Nor is . . . ongoing political activity as likely . . . to cause division on strictly religious lines.[7]

Section 5 Has a Secular Purpose and Primary Effect and Is Devoid of Any State Entanglement With Religion

In *Lemon* v. *Kurtzman,* 403 U.S. 602 (1971), this Court summarized the tests applicable to a determination of constitutionality under the Establishment Clause:

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[7] 350 F.Supp. at 670-71; JSA, pp. 31a-32a (set apart for ease in reading; emphasis in original).

> Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . ; finally, the statute must not foster "an excessive government entanglement with religion." . . .[8]

Secular Purpose

Section 3 of Chapter 414 sets forth the New York Legislature's findings with respect to the modification provided for by Section 5. *See* BA, pp. 12a-13a; JSA, pp. 66a-67a. The District Court stated:

> . . . we accept these findings . . . They sum up legislative purposes which are cast as secular in intent.[9]

> . . . [Section 5] has a particular secular intent—one of equity—to give some recompense by way of tax relief to our citizens who bear their share of the burden of maintaining the public schools and who, because of religious belief or otherwise, send their children to nonpublic full-time schools, as is their constitutional right.[10]

Indeed, *Pearl* concedes that Section 5 has a secular legislative purpose: Section 3, among others, "contains a long recital of secular legislative purposes and in view of this Court's apparently firm policy of taking such recitals at face value, it would probably be fruitless to seek to show that there is less secularity . . . than meets the eye." Brief for Appellants, p. 14.

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[8] 403 U.S. at 612-13. *See also Tilton* v. *Richardson*, 403 U.S. 672, 678 (1971).

[9] 350 F.Supp. at 659; JSA, p. 7a.

[10] 350 F.Supp. at 670-71; JSA, pp. 31a-32a.

This Court stated in upholding the constitutionality of New York's exemption of religious institutions from real property taxes that "[t]he legislative purpose of the property tax exemption is neither the advancement nor the inhibition of religion; it is neither sponsorship nor hostility." [11] Although concluding that the statutes involving teachers' salaries in *Lemon* v. *Kurtzman* violated the Establishment Clause, this Court nevertheless found that "[i]nquiry into the legislative purposes of the Pennsylvania and Rhode Island statutes affords no basis for a conclusion that the legislative intent was to advance religion." 403 U.S. at 613. Inquiry into the legislative purpose of Section 5 affords no more of a basis for such a conclusion in this case.

Principal Effect Is Partial Alleviation of Taxpayers' Burden

Two "main evils" against which the Establishment Clause was intended to afford protection are sponsorship and financial support of religious activity on the part of government. *See Lemon* v. *Kurtzman*, 403 U.S. at 612. In *Walz* v. *Tax Comm'n of the City of New York*, 397 U.S. 664 (1970), this Court concluded, among other things:

> . . . We cannot read New York's statute as attempting to establish religion; it is simply sparing the exercise of religion from the burden of property taxation levied on private profit institutions. 397 U.S. at 673.

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[11] *Walz* v. *Tax Comm'n of the City of New York*, 397 U.S. 664, 672 (1970). In a concurring opinion, Justice Brennan stated that:

> Government has two basic secular purposes for granting real property tax exemptions to religious organizations. First, these organizations are exempted because they, among a range of other private, nonprofit organizations contribute to the well-being of the community in a variety of nonreligious ways . . . Second, government grants exemptions to religious organizations because they uniquely contribute to the pluralism of American society . . . 397 U.S. at 687, 689.

> The grant of a tax exemption is not sponsorship since the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state. . . . There is no genuine nexus between tax exemption and establishment of religion. 397 U.S. at 675.
>
> Nothing in . . . two centuries of uninterrupted freedom from taxation has given the remotest sign of leading to an established church or religion . . . 397 U.S. at 678.

If complete exemption of houses of worship from taxation cannot be interpreted as attempting to establish religion, can a tax provision significantly less pervasive—a mere modification—benefiting individual taxpayers be so interpreted? The District Court could not do so.

The New York State personal income tax is based, in general, on the federal income tax. Thus, the "New York adjusted gross income of a resident individual means his federal adjusted gross income as defined in the laws of the United States for the taxable year, with the modifications specified in this section." N.Y. Tax Law § 612(a). Section 5 of Chapter 414 is one of some 16 such modifications presently specified. *See* N.Y. Tax Law § 612(c). It is not an exemption from the payment of any income taxes as provided by Section 501 of the Internal Revenue Code[12] or from the payment of any municipal taxes as provided by Section 1230 of the New York Tax Law or from the payment of any real property taxes as provided by Section 421.1(a) of the New York Real Property Tax Law. Not only do these statutes provide full immunity from taxation, they exempt organizations operated *"exclusively for religious . . . purposes,"* not individual taxpayers.

Section 5 also does not provide for a "deduction" as that term is commonly understood and applied. Taxpayers are

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[12] 26 U.S.C. §501.

entitled to deduct amounts from their gross incomes equal to various expenses they have incurred in a given year, including, for example, ordinary and necessary business expenses, interest paid, local taxes, even contributions made to churches. *See* 26 U.S.C. §§162-64, 170. Indeed, the District Court pointed out:

> ... It has been a consistent legislative policy ever since the 1917 Revenue Act for the Congress to permit the deduction of so-called charitable contributions from personal income. This has always included direct gifts to churches. 350 F.Supp. at 672; JSA, p. 34a (footnote omitted.)

Under Section 5, on the other hand, the amounts which qualified taxpayers may subtract vary according to their federal adjusted gross incomes and the number of children (not exceeding three) attending nonpublic schools as follows:

If New York adjusted gross income is:	The amount allowable for each dependent is:
Less than $9,000	$1,000
9,000 — 10,999	850
11,000 — 12,999	700
13,000 — 14,999	550
15,000 — 16,999	400
17,000 — 18,999	250
19,000 — 20,999	150
21,000 — 22,999	125
23,000 — 24,999	100
25,000 and over	–0–

In stating that "Chapter 414 is not a tax deduction statute,"[13] *Pearl* would have this Court believe that Section 5 will always entitle taxpayers to modify their adjusted gross incomes by amounts greater than those expended to send their children to nonpublic schools, that is, that modifi-

[13] Brief for Appellants, p. 40.

cation pursuant to Section 5 will always be a more liberal factor in computing one's income taxes than a straight deduction would be. *See* Brief for Appellants, p. 41. This is clearly not so. If appellee Boylan, for example, who paid a total of $700.00 to send her two children to nonpublic school last year,[14] had an adjusted gross income of $17,000, she would be entitled to subtract only $500 from that adjusted gross income before proceeding to determine her tax liability; if $20,000, then only $300. On the other hand, even if appellee Boylan's New York adjusted gross income were low enough to entitle her to subtract an amount greater than the $700.00 she actually paid in tuition, say $10,700 (thereby entitling her to subtract $1,700 from the $10,700 for her two children), her net tax benefit would be $96[15] as opposed to the $700.00 previously paid.

Just as clearly as Section 5 is not an exemption or a deduction, neither is it a tax credit. A tax credit is generally a fixed sum bearing no direct relationship to either the income of a taxpayer or his tax liability. The government merely forgives part of that liability once it has been determined. For example, last year, an individual New York taxpayer was entitled to an across-the-board credit of $12.50 against his income tax ($25.00 for married persons)[16] irrespective of his income or the tax owed. The difference between the significance and effect of a tax credit as opposed to a tax liability factor such as a deduction is perhaps best illustrated by the Internal Revenue Code's new provisions with respect to contributions to candidates for public office, 26 U.S.C. §§41, 218. Under these sections, a taxpayer has the option of either deduct-

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[14] *See* Appendix, p. 26a.

[15] Based on a family of four. *See* N.Y. Tax Law §§ 602(b), 616 (McKinney Cum. Supp. 1972).

[16] N.Y. Tax Law §606(a) (McKinney Cum. Supp. 1971, repealed, [1972] Laws of N.Y. ch. 1, §6).

ing an amount contributed or taking a tax credit. If, for example, an individual taxpayer with an otherwise taxable income of $8,000 contributed $25 last year to a political candidate, he could deduct the $25 pursuant to Section 218, thereby resulting in a taxable income of $7,975 and a tax liability of $1,584. *See* 26 U.S.C. §1(c). On the other hand, if the same taxpayer opted for the tax credit (in the amount of $12.50) pursuant to Section 41, his tax liability would be $1,590[17] less $12.50 or $1,577.50. Obviously, subtraction of a given amount from adjusted gross income, such as is provided for by Section 5 of Chapter 414, is not the same as a tax credit,[18] and it is misleading for *Pearl* to argue otherwise. *See, e.g.,* Brief for Appellants, pp. 40-41.

In sum, the modification provided for by Section 5 is neither a tax exemption nor a credit and can often amount to even less than a deduction. The extent and effect of the resultant benefit to individual taxpayers is therefore clearly limited.

The exemption of church property from taxation "necessarily operates to afford an indirect economic benefit." *Walz* v. *Tax Comm'n of the City of New York,* 397 U.S. at 674. Also:

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[17] *See* 26 U.S.C. §1(c).

[18] For examples of tax credit statutes, see [1971] Laws of Minn. ch. 944, Minn. Stat. §§ 290.086, 290.087; Ohio Rev. Code §§ 5703.052, 5747.05, 5747.111 (1972 Page's Current Service No. 3). By way of comparison, the Ohio statute entitles taxpayers who pay to send children to school, including *public* schools, to a tax credit of up to $90.00. This enactment has been held unconstitutional by a three-judge federal District Court. *See Kosydar* v. *Wolman,* —— F.Supp. —— (S.D. Ohio, Dec. 29, 1972), *appeal docketed* Feb. 16, 1973, No. 72-1139. On the other hand, the Minnesota statute has been held "valid under both the United States and Minnesota Constitutions." *Minnesota Civil Liberties Union* v. *State of Minnesota,* File Nos. 379526, 380252 (D.C. Ramsey Cty, July 6, 1972), opinion reproduced in full in original form as Appendix B to Doc. No. 21, Record on Appeal herein.

> . . . For so long as federal income taxes have had any potential impact on churches—over 75 years—religious organizations have been expressly exempt from the tax. Such treatment is an "aid" to churches no more and no less in principle than the real estate tax exemption granted by States.[19]

However, Section 5 is, as the District Court observed, a "step removed." 350 F.Supp. at 672; JSA, p. 34a. That is, whereas tax exemption applies to churches, Section 5 applies to individual taxpayers. Thus, if tax exemption results in only an indirect benefit to religion, it is difficult to discern even an indirect benefit to *religion* under Section 5, let alone the advancement thereof as the *principal* or *primary* effect. As for benefit to nonpublic schools, to quote again from the District Court's majority opinion above, "the benefit . . . *if any, is so remote* as not to involve impermissible financial aid to church schools."[20]

The reason for the District Court's inability to find any financial support of religious activity by Section 5 is clear, namely, Section 5 "does not involve a subsidy or grant of money *from the State Treasury.*" 350 F.Supp. at 670; JSA, p. 31a (emphasis in original). *Cf. Walz* v. *Tax Comm'n of the City of New York,* 397 U.S. at 675. Section 5 is no more a "subsidization"[21] than are deductions for extraor-

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[19] *Walz* v. *Tax Comm'n of the City of New York,* 397 U.S. at 676 (footnote omitted).

[20] 350 F.Supp. at 671; JSA, p. 32a (emphasis added). *Pearl* has concocted a "profile" with respect to these schools, one which it concedes may actually fit "few schools in New York." Brief for Appellants, p. 19. *See id.* at p. 5. Indeed, there is little in the record in this case, save mere allegations, tending to support *Pearl's* "profile", and this fact is perhaps the reason for this Court's refusal to rely on such unfounded assumptions in cases such as this. *See, e.g., Tilton* v. *Richardson,* 403 U.S. at 682. Then again, Section 5 applies to individual taxpayers, not nonpublic schools, to begin with.

[21] Brief for Appellants, p. 42.

dinary medical expenses[22] or for interest on a home mortgage or for the innumerable other significant expenses taxpayers incur and of which both Congress and the New York State Legislature have chosen to take particular cognizance in the tax laws. It hardly can be argued that medical expense deductions provide a state subsidy of the medical profession or that mortgage interest deductions subsidize banks. Furthermore, there can be no question but that the principal or primary effect of any of these subtractions, including Section 5, is the partial alleviation of the tax burden on individual taxpayers.

Involvement Between Church and State Under Section 5 Is Nonexistent

The third "main evil" against which the Establishment Clause was intended to afford protection is "active involvement of the sovereign in religious activity." *Lemon* v. *Kurtzman*, 403 U.S. at 612; *Walz* v. *Tax Comm'n of the City of New York*, 397 U.S. at 668. And the degree of such involvement must be "excessive" before the relationship between church and state is unconstitutional. In *Walz*, for example, this Court stated:

> . . . the questions are whether the involvement is excessive, and whether it is a continuing one calling for official and continuing surveillance leading to an impermissible degree of entanglement. 397 U.S. at 675.

Application of this standard to tax exemption of churches in *Walz* resulted in a conclusion that:

> . . . The exemption creates only a minimal and remote involvement between church and state . . . It . . . tends to complement and reinforce the desired separation insulating each from the other. 397 U.S. at 676.

[22] *See* 26 U.S.C. §213.

grants to schools serving a high concentration of pupils from low-income families in amounts "equal to the product of thirty dollars multiplied by the average daily attendance of pupils receiving instruction in such school[s], to be applied for costs of maintenance and repair." [2]

Section 2 requires the Commissioner of Education to make tuition reimbursement payments to parents of pupils enrolled full-time in nonpublic schools whose New York taxable income is under five thousand dollars and who have paid $20.00 or more tuition to such schools in a given calendar year. These payments are to be the lesser of either (a) 50 per cent of the tuition paid or (b) $5 per month for the period of enrollment of pupils in grades 1-8 or $10 per month for the period of enrollment of students in grades 9-12.

Section 5 entitles a taxpayer to subtract from his federal adjusted gross income, in computing his New York adjusted gross income, a sliding-scale amount multiplied by the number of his dependents, not exceeding three, attending a nonpublic school, provided such taxpayer is allowed an exemption for such dependent, has paid at least $50.00 for each such dependent in tuition to the nonpublic school, has not claimed a tuition reimbursement payment pursuant to Section 2 and has a New York adjusted gross income, without the benefit of the foregoing modification, of less than twenty-five thousand dollars.[3]

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[2] This formula is increased to $40 for schools built prior to 1947.

[3] The remaining substantive sections (7-10) of Chapter 414 are not involved in any of these four consolidated appeals. Section 7 entitles public school districts which experience increases in student enrollment because of closings of nonpublic schools to financial aid. Sections 8-10 establish procedures for the purchase of existing closed nonpublic school buildings by public school districts.

Questions Presented

1. Whether the Establishment Clause of the First Amendment permits the New York Legislature to lessen the state income tax burden on taxpayers with children attending nonpublic schools.

2. Whether the Establishment Clause permits partial reimbursement by New York State of low-income parents for tuition they pay to send their children to nonpublic schools.

Statement of the Case

The Committee for Public Education and Religious Liberty [hereinafter referred to as *"Pearl"*] and 19 individuals instituted this action against Ewald B. Nyquist, Arthur Levitt and Norman Gallman in their respective capacities as Commissioner of Education, Comptroller and Commissioner of Taxation and Finance of the State of New York, praying that enforcement of Sections 1 through 5 of Chapter 414 be permanently enjoined on the ground, *inter alia*, that these sections on their face violate the Establishment Clause. Appellants Cherry, Ferguson and Ruiz were permitted to intervene as parties defendant on the ground that they are parents of nonpublic school children who qualify for reimbursement pursuant to Section 2. Appellees Boylan, Ducey, Ferrarella and Roos were permitted to intervene as parties defendant on the ground that they are parents of nonpublic school children who qualify for modification of their New York adjusted gross incomes pursuant to Section 5. In addition, Senator Earl W. Brydges was permitted to intervene as a party defendant in his capacity as Majority Leader and President Pro Tem of the New York State Senate.

In this case, there is not even a minimal and remote involvement between church and state, and the District Court did not find otherwise. *See* 350 F.Supp. at 673; JSA, p. 37a. The relationship under Section 5 is between taxpayer and state. And this relationship did not arise as a result of enactment of Section 5; it has existed ever since New York first enacted a personal income tax. Furthermore, application of Section 5 is no different (or more entangled) than that for any of the other modifications permitted by Section 612(c) of the New York Tax Law. A taxpayer simply determines whether he is eligible for a modification under Section 5 and, if so, the amount thereof, which he then enters and subtracts on his income tax return as explained on page 6 of this year's instruction booklet to all New York taxpayers, part of which appears as follows:

Line 4 / Subtractions

Enter on Line 4 the amount of these subtractions from your total Federal income and explain each item in Schedule C on Page 2.

1 Subtract the amount shown in the table below for dependent students on whose behalf you paid tuition of at least $50 each for attendance at a nonpublic school in NY State. To qualify the student must be in grades 1 through 12, on a full-time basis for at least 4 months of the regular school year. You may claim this subtraction on behalf of no more than 3 dependent students and cannot claim this subtraction if you claim a tuition reimbursement payment pursuant to the Education Law.

*If NY Adjusted Gross Income without this Subtraction is:	Subtract on Line 4 if you have:		
	1 qualified student	2 qualified students	3 qualified students
Less than $9,000	$1,000	$2,000	$3,000
$ 9,000 to 10,999	850	1,700	2,550
11,000 to 12,999	700	1,400	2,100
13,000 to 14,999	550	1,100	1,650
15,000 to 16,999	400	800	1,200
17,000 to 18,999	250	500	750
19,000 to 20,999	150	300	450
21,000 to 22,999	125	250	375
23,000 to 24,999	100	200	300
25,000 and over	0	0	0

*This is Total New York Income which would be reported on Line 5 except for this subtraction.

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Not only is Section 5 totally devoid of any involvement between church and state, it also does not entail any "divisive political potential," [23] a fact which the District Court recognized. *See* 350 F.Supp. at 673; JSA, p. 37a. Surely, if "a page of history is worth a volume of logic" [24] and for over two centuries the states have exempted churches from taxation and for over half a century direct contributions to churches have been tax deductible without any manifestations of political divisiveness, can it be argued that Section 5 involves a potential for political divisiveness? We think not.

State Legislatures Have Wide Discretion in the Exercise of Their Taxing Powers

The District Court quite properly stated its awareness of the fact that plaintiffs' complaint[25] does not specifically challenge Section 5 on equal protection grounds. *See* 350 F.Supp. at 673; JSA, pp. 36a-38a. Indeed, *Pearl* is forced to concede that "legislatures have wide discretion in allowing deductions, credits and exemptions." Brief for Appellants, p. 43.

A state does have wide discretion in the exercise of its taxing powers, and unless a classification is obviously arbitrary and irrational in that it serves no legitimate state interest, courts will not interfere. Any basis of difference having a fair and substantial relation to the object of the legislation is all that is required to sustain the classification so long as all persons similarly situated are treated alike. *See, e.g., Allied Stores of Ohio, Inc.* v. *Bowers,* 358 U.S. 522, 526-28 (1959); *Louisiana Gas & Electric Co.* v. *Coleman,* 277 U.S. 32, 37, 40 (1928); *Rogers* v. *Hennepin County,* 240

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[23] *Lemon* v. *Kurtzman,* 403 U.S. 602, 622 (1971).

[24] *New York Trust Co.* v. *Eisner,* 256 U.S. 345, 349 (1921); *Walz* v. *Tax Comm'n of the City of New York,* 397 U.S. at 675-76.

[25] *See generally* Appendix, pp. 7a-15a.

U.S. 184, 192 (1916); *Bell's Gap R.R. Co.* v. *Pennsylvania*, 134 U.S. 232, 237 (1890). In *Carmichael* v. *Southern Coal & Coke Co.*, 301 U.S. 495 (1937), this Court stated:

> . . . It is inherent in the exercise of the power to tax that a state be free to select the subjects of taxation and to grant exemptions. Neither due process nor equal protection imposes upon a state any rigid rule of equality of taxation. . . . This Court has repeatedly held that inequalities which result from a singling out of one particular class for taxation or exemption, infringe no constitutional limitation. . . .
>
> Like considerations govern exemptions from the operation of a tax imposed on the members of a class. A legislature is not bound to tax every member of a class or none. *It may make distinctions of degree having a rational basis, and when subjected to judicial scrutiny they must be presumed to rest on that basis if there is any conceivable state of facts which would support it.* . . .
>
> This restriction upon the judicial function, in passing on the constitutionality of statutes, is not artificial or irrational. A state legislature, in the enactment of laws, has the widest possible latitude within the limits of the Constitution. . . .
>
> . . . The existence of local conditions which, because of their nature and extent, are of concern to the public as a whole, the modes of advancing the public interest by correcting them or avoiding their consequences, are peculiarly within the knowledge of the legislature, and to it, and not to the courts, is committed the duty and responsibility of making choice of the possible methods. 301 U.S. at 509, 510, 514-15 (emphasis added, citations omitted).

The question thus is whether partial alleviation of the burden on taxpayers who support public education, but who choose to send their children to nonpublic schools and thereby benefit to a markedly lesser degree from public education, has any rational basis. The District Court found

that it has, to wit, "one of equity." 350 F.Supp. at 670; JSA, p. 31a.

While it is undoubtedly true, in general, that taxes are not assessments based on direct or indirect benefits to individual taxpayers, but rather are the means of distributing the burden of the cost of government, it is neither irrational nor unusual to provide some relief to those persons who benefit to a lesser degree from a given tax than do other taxpayers. For example, New York City taxes the earnings of nonresidents at a different rate than those of residents. *Compare* Section U46-2.0 of the New York City Administrative Code[26] *with* Section T46-3.0. Under the Internal Revenue Code, up to $25,000 of income earned by a United States citizen who is a bona fide resident of a foreign country can be excluded from income taxation. *See* 26 U.S.C. § 911(c)(1)(B).

There are, of course, other rational reasons for enactment of Section 5 which are wholly unrelated to the establishment of religion. Two very important ones are the holding down of the already severe tax burden on *all* taxpayers and the maintaining of *public* education at at least its present level. The New York Legislature, in enacting Section 5, made a specific finding that:

> [Nonpublic] educational institutions not only provide education for the children attending them, but by their existence, relieve the taxpayers of the state of the burden of providing public school education for those children. BA, p. 13a; JSA, p. 67a.

In summary, then, we submit that there is no genuine nexus between modification of the adjusted gross incomes of individual taxpayers pursuant to Section 5 and establishment of religion and that the District Court was correct in dismissing *Pearl's* complaint with respect thereto.

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[26] Vol. 5A.

Summary of Argument As to Tuition Reimbursement

Section 2 of Chapter 414 is carefully limited to meeting a pressing problem of low-income parents (and their children) who would otherwise be denied the freedom of educational choice possessed by more affluent members of our society. It is significantly different from tuition reimbursement statutes in Ohio and Pennsylvania which have come under review by this Court, but rather is analogous to numerous other federal and state enactments tending to enhance the general welfare of families near or below the poverty level.

Applying this Court's controlling tests, as summarized in *Lemon* v. *Kurtzman* and *Tilton* v. *Richardson,* to Section 2 shows not only that it has a secular purpose, a fact conceded by *Pearl,* but also that its principal or primary effect is neither to advance nor to inhibit religion; rather, it is to nurture a pluralistic society, just as is done by innumerable other federal and state laws relating to the general health, education and welfare of the least affluent members of society. There is and can be no excessive entanglement with religion on the part of the state under Section 2 since the mechanism for its enforcement is the already-existing relationship of taxpayer and state.

While Section 2 clearly seeks to enhance the welfare of individuals and not institutions, the District Court erroneously based its decision upon those individuals' right to the free exercise of religion, a right which is not the controlling constitutional basis and which the intervenor-parents actually before the Court did not press as controlling the constitutionality of Section 2.

ARGUMENT AS TO TUITION REIMBURSEMENT

THE VITALITY OF OUR PLURALISTIC SOCIETY IS DEPENDENT UPON THE CAPACITY OF INDIVIDUAL PARENTS TO SELECT A SCHOOL, OTHER THAN PUBLIC, FOR THE EDUCATION OF THEIR CHILDREN; SECTION 2 OF CHAPTER 414 SERVES TO PRESERVE THIS CAPACITY FOR LOW-INCOME PARENTS

A New York parent is not required to send his children to public schools. *See Pierce* v. *Society of Sisters,* 268 U.S. 510 (1925); *Wisconsin* v. *Yoder,* 406 U.S. 205 (1972). Instead, he may send his children to nonpublic schools, so long as the instruction provided is "at least substantially equivalent" [27] to that given in the public schools. Thus, as of the fall of 1968, there were 1,415 Roman Catholic, 164 Jewish, 59 Lutheran, 49 Episcopal, 37 Seventh Day Adventist and 18 other religiously-affiliated nonpublic schools[28] in New York. There were also 296 nonpublic schools with no religious affiliations. *See* N.Y. State Educ. Dep't, *Financial Support—Nonpublic Schools—New York State* 3 (1969).

> In 1968-69, well over half (61.6 percent) of the pupils enrolled in nonpublic schools in New York State attended schools in the "Big Six" cities of Albany, Buffalo, New York, Rochester, Syracuse and Yonkers. . . . New York City alone had slightly more than half the enrollment (51.4 percent), and an additional 10.2 percent was accounted for by the other large cities (Buffalo, 4.3 percent; Rochester, 1.9 percent; Albany, 1.5 percent; Yonkers, 1.3 percent; Syracuse, 1.2 percent).[29]

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[27] N.Y. Educ. Law § 3204.2.

[28] Includes schools affiliated with Society of Friends, Mennonite, Greek Orthodox, Russian Orthodox, Methodist and Baptist churches.

[29] N.Y. State Educ. Dep't, *Financial Support—Nonpublic Schools—New York State* 4 (1969).

Approximately 20% (800,000) of all school children in New York State attend nonpublic schools. Of these 800,000 children, a substantial number come from families near or below the poverty level. While exact figures are not available, it has been reliably estimated that there are presently about 70,000 families with children enrolled in Catholic schools in New York City alone and taxable incomes of less than $5,000 per year:

> . . . The father is usually a blue or white collar worker, more frequently found in the unskilled areas of work than performing professional tasks. He is in a stable marriage union to a woman who works at home. The mother seems to move into the market place as a full time worker when she sends her children to Catholic high school. These Catholic school parents in New York City, far from being affluent, earn a modest income . . .
>
> The take-home pay of such families illustrates the economic struggle going on within these homes. About one quarter took home less than $100 per week and more than three out of every five families (62 per cent) cleared less than $150.00. In some New York counties, where large numbers of Negroes and Spanish had children in parochial schools, the economic picture was somewhat darker. In Manhattan, for example, 41 per cent reported less than $100 weekly and 77 per cent less than $150.[30]

Out of 65,937 pupils enrolled last year in Catholic elementary schools in the Bronx, Manhattan and Staten Island, 30,922 were non-white. "Today, more than 60 percent of [Catholic nonpublic school] elementary school students in Manhattan are black or Spanish-speaking; 30 percent of them in the Bronx." *Hearings on H. R. 16141 and Other*

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[30] Kelly, *The "Nearly Poor Catholics" in New York City*, 1 St. John's Univ., N.Y. Research Bulletin 2 (Jan., 1972).

Pending Proposals Before Committee on Ways and Means, 92nd Cong., 2d Sess., pt. 3, at 583 (Sept. 7, 1972).

In view of these and other related facts, the Legislature enacted Section 2 of Chapter 414, based upon findings that:

> 1. The vitality of our pluralistic society is, in part, dependent upon the capacity of individual parents to select a school, other than public, for the education of their children. A healthy competitive and diverse alternative to public education is not only desirable but indeed vital to a state and nation that have continually reaffirmed the value of individual differences.
>
> 2. The Supreme Court of the United States has recognized and reaffirmed this right of selection. This right, however, is diminished or even denied to children of lower-income families, whose parents, of all groups, have the least options in determining where their children are to be educated. N.Y. Educ. Law § 559.1 and 2, BA, p. 7a; JSA, p. 61a.

The District Court stated:

> . . . we accept these findings . . . They sum up legislative purposes which are cast as secular in intent . . . we must start with the assumption that the Legislature intended to provide a quality education for all children and to nurture a pluralistic society . . .
>
> In sum, we do not go behind the statements of the New York Legislature . . . 350 F.Supp. at 659-60; JSA, pp. 7a-8a.

Section 2 Uniquely Enhances the General Welfare

Section 2 requires the Commissioner of Education to make tuition reimbursement payments to parents of pupils enrolled full-time in nonpublic schools whose New York taxable income is under five thousand dollars and who have paid $20.00 or more in tuition to such schools in a given calendar year. These payments are to be the lesser of either

(a) 50 per cent of the tuition paid or (b) $5 per month for the period of enrollment of pupils in grades 1-8 or $10 per month for the period of enrollment of students in grades 9-12.

Appellant Cherry, who is divorced, has two sons who attend a nonpublic high school in Brooklyn. Their combined tuition for the school year 1971-72 was approximately $500.00. *See* Appendix, p. 28a. Under Section 2, she would be entitled to a total reimbursement of $200 for the year. Appellant Ferguson has a daughter who also attends a nonpublic high school in Brooklyn. Appellant Ferguson, a widow on pension who had a New York taxable income of less than $1,000 for 1971, paid $700.00 in tuition for the past school year. *See id.* at 34a. Under Section 2, she would be entitled to be reimbursed in the amount of $100. Appellant Ruiz has two daughters who attend nonpublic high schools in Manhattan. She paid $40.00 tuition per month for the school year 1971-72. *See id.* at 38a, 39a. She is now paying $100.00 per month. Under Section 2, she would be entitled to a total reimbursement of $20 per month.

Section 2 differs significantly from tuition reimbursement statutes which have recently come under review in Ohio and Pennsylvania. In *Wolman* v. *Essex,* 342 F.Supp. 399 (S.D. Ohio), *aff'd,* 409 U.S. 808 (1972), a three-judge District Court held that the "parental financial grants" contemplated in Section 3317.062 of the Ohio Revised Code violate the Establishment Clause. But the Ohio statute was clearly dissimilar to Section 2. It provided for flat grants to all parents of $90.00 per annum per nonpublic school pupil without any correlation to the financial situation of the parent. Before a parent could receive such a grant, he must have "spent an amount equal to or in excess of the per-child grant for the purpose of providing educational opportunities to his child equivalent to those avail-

able to children in the public schools in the district." Thus, a person who spent $90.00 would get back 100 percent, $100.00 90 percent, and so on. A person who spent $85.00 for his child would get nothing. In short, unlike Section 2, the Ohio act contained no mechanism for limiting the aid to one half or less of the tuition actually paid by parents who have a grave financial need. Pennsylvania's "Parent Reimbursement Act for Nonpublic Education"[21] is presently under review by this Court *sub nom. Sloan* v. *Lemon* and *Crouter* v. *Lemon,* Docket Nos. 72-459, 72-620, *prob. juris. noted* Jan. 22, 1973, 35 L.Ed.2d 268. This statute provides for payments of $75 and $150 per annum to parents of elementary and secondary nonpublic school pupils, respectively, or "the actual amount of tuition paid or contracted to be paid by a parent, whichever is lesser". [1971] Laws of Pa. No. 92, § 7, Pa. Stat. tit. 24, § 5707. There is obviously no provision in Section 2 similar to this act.

Section 2, it should be emphasized, is carefully limited to meeting a pressing problem of low-income parents (and their children) who would otherwise be denied the freedom of educational choice possessed by more affluent members of our society. It is analogous to numerous other enactments providing food stamps, medical assistance and other services oriented to the needs of families near or below the poverty level.

The District Court Erred in Not Applying the Pertinent Constitutional Tests

The District Court did not apply all of the specific tests summarized by this Court in *Lemon* v. *Kurtzman* (and in *Tilton* v. *Richardson*), *supra,* p. 10. *See generally* 350 F. Supp. at 667-70, 674-76; JSA, pp. 25a-31a, 40a-45a. A

[21] [1971] Laws of Pa. No. 92, Pa. Stat. tit. 24, §§ 5701-11.

careful reading of the District Court's opinion(s) with respect to Section 2 shows that the court specifically applied only the first of these tests, namely the secular legislative purpose test, and this resulted in an express finding that the purpose of Section 2 is secular, *i.e.*, constitutional. *See supra*, p. 25.

The opinion(s) do not set forth specific conclusions that the principal or primary effect of Section 2 is the advancement of religion or that it fosters an excessive government entanglement with religion. They do not state that implementation of Section 2 would inhibit *Pearl's* free exercise of religion.[32] Instead, the District Court focused its decision with respect to Section 2 on the right of appellants Cherry, Ferguson and Ruiz to the free exercise of religion.

The right to the free exercise of religion is unchallenged. The right to educate one's child in conformity with one's religious beliefs is no longer open to challenge. *See Wisconsin* v. *Yoder, supra. Cf. Pierce* v. *Society of Sisters, supra.* But these right(s) of the appellants are not the basis of a test of the constitutionality of legislation such as Section 2,[33] and appellants Cherry, Ferguson and Ruiz did not argue otherwise in the District Court.[34] Nevertheless, the District Court's opinion(s) with respect to Section 2 dwell on the "implications of recognizing a 'right' to the support of public funds for the expression of the free exercise of religion"[35] to the disregard of the specific tests controlling the constitutionality of state aid to nonpublic

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[32] *Cf. Tilton* v. *Richardson*, 403 U.S. at 678.

[33] *Cf. Brusca* v. *State of Missouri ex rel. State Board of Education*, 332 F.Supp. 275 (E.D. Mo. 1971), *aff'd*, 405 U.S. 1050 (1972).

[34] *See, e.g.*, Reply Brief for Intervenor-Defendants Boylan, Cherry, Ducey, Ferguson, Ferrarella, Roos and Ruiz, p. 5, Doc. No. 21, Record on Appeal.

[35] 350 F.Supp. at 669; JSA, p. 28a.

education set forth by this Court in *Lemon* v. *Kurtzman* and *Tilton*. Certainly, the question presented herein is not the rhetorical one posed by the District Court in its opinion, to wit, "[i]f State subsidy may be given for religious education, why may it not be given to the poor for the purchase of sacramental wine, or a crucifix or a Torah, a printing press for Jehovah's Witnesses, or for a trip to a Baptist convention or to hear a favorite evangelist, or for a Muslim to take his pilgrimage to Mecca." [36] Rather, the question is whether partial reimbursement for tuition paid by low-income parents in sending their children to nonpublic schools which provide a "substantially equivalent" [37] education meets all of this Court's constitutional tests.

The Principal or Primary Effect of Section 2 Is Neither to Advance Nor to Inhibit Religion; Rather It Is to Nurture a Pluralistic Society

Chief Justice Burger stated in *Tilton* that

> [t]he *crucial question* is not whether *some* benefit accrues to a religious institution as a consequence of the legislative program, but whether its *principal* or *primary effect* advances religion. 403 U.S. at 679 (emphasis added).

This Court accepts the fact that secular and religious education in church-related schools are identifiable and separable [38] and that such schools perform, in substantial part, a secular function. [39] In view of this, we submit that

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[36] *Id.*

[37] *Supra*, note 27.

[38] *See Lemon* v. *Kurtzman*, 403 U.S. at 613. This Court in *Board of Education* v. *Allen*, 392 U.S. 236 (1968), specifically refused to assume that religiosity necessarily permeates the education provided by the parochial elementary and secondary schools in the State of New York. *See Tilton* v. *Richardson*, 403 U.S. at 681.

[39] *See Board of Education* v. *Allen*, 392 U.S. at 248.

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a "failure of the state to insure that the funds are restricted to secular education or general welfare services"[40] is demonstrably unconstitutional only (i) where substantially all of the cost of education (including tuition paid) is reimbursed by the state and (ii) when it is assumed that parents of nonpublic school children would simply pass the state payments on to nonpublic schools. However, under no circumstances can a parent be reimbursed pursuant to Section 2 for more than 50 per cent of the tuition he has already paid, and in most, if not all, cases the percentage of reimbursement will be much less than 50 per cent. Then again, *Pearl* concedes that "the amount of each tuition bill allocable to religion may by itself be small." Brief for Appellants, p. 36. A parent becomes entitled to reimbursement only after he has irrevocably parted with his own money to pay tuition to the school and has submitted proof that that tuition has been paid. Furthermore, the partial reimbursement is payable to him, and *not* to the school, and can be spent by him for whatever purpose he chooses.

If the appropriate test of Section 2's constitutionality is the principal or primary effect test, then the question is whether New York State's partial reimbursement of appellant Ferguson, for example, in the amount of $100 for the $700.00 she paid last year to send her daughter to a fully accredited nonpublic high school would have as its *principal* or *primary effect* the *advancement of religion.*

The lead opinion in *Tilton* states that

> [t]he simplistic argument that every form of financial aid to church-sponsored activity violates the Religion Clauses was rejected long ago in *Bradfield* v. *Roberts*, 175 U.S. 291 (1899). There a federal construction grant to a hospital operated by a religious order was upheld.

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[40] *Lemon* v. *Sloan*, 340 F.Supp. 1356, 1364 (E.D. Pa. 1972).

> Here the Act is challenged on the ground that its primary effect is to aid the religious purposes of church-related colleges and universities. Construction grants surely aid these institutions in the sense that the construction of buildings will assist them to perform their various functions. But bus transportation, textbooks, and tax exemptions all gave aid in the sense that religious bodies would otherwise have been forced to find other sources from which to finance these services. Yet all of these forms of governmental assistance have been upheld. 403 U.S. at 679.

In that case, a majority of this Court concluded that the construction of certain buildings on the campuses of four Catholic colleges in Connecticut with the aid of public funds did not have as its principal or primary effect the advancement of religion. Similarly, this Court concluded in *Board of Education* v. *Allen*, 392 U.S. 236 (1968), that New York's requirement that textbooks be loaned at public expense to pupils attending nonpublic schools is a law, the primary effect of which neither advances nor inhibits religion. *See* 392 U.S. at 243. *See also Walz* v. *Tax Comm'n of the City of New York*, 397 U.S. at 672. This Court reached similar conclusions with respect to Sunday closing laws[41] and a New Jersey law entitling parents to reimbursement for the bus transportation of their children to and from parochial schools.[42] Indeed, even in *Lemon* v. *Kurtzman*, where this Court concluded that Pennsylvania and Rhode Island statutes relating to the salaries of nonpublic school teachers were constitutionally unacceptable, that conclusion was not based upon any determination that the principal or primary effect of those statutes was the advancement of religion. In sum, statutes providing bus transportation, school lunches, public health services, secu-

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[41] *See McGowan* v. *Maryland*, 366 U.S. 420 (1961).

[42] *See Everson* v. *Board of Education*, 330 U.S. 1 (1947).

lar textbooks, even certain buildings, all at public expense, do not offend the Establishment Clause. And the reason that statutes such as these (and Section 2) do not offend the Establishment Clause is that they benefit essentially the parent or child[43] and entail no direct relationship between church or church-related institution and state.[44] This Court stated in *Lemon* v. *Kurtzman* that "[c]andor compels acknowledgement . . . that we can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law." 403 U.S. at 612. *See also id.* at 614.[45] Candor herein requires recognition that individual parents are no less the primary and direct beneficiaries of Section 2 than they were with respect to school bus transportation and textbooks.

As for indirect benefit, there are innumerable laws, both federal and state, which benefit indirectly nonpublic educational institutions in a manner similar to that conferred by Section 2. For example, the *Veterans Readjustment Benefits Act of 1966*[46] ("G.I. Bill of Rights") and *National Defense Education Act of 1958*[47] provide tuition payments (and in the case of the G.I. Bill, textbooks) for student veterans attending schools and colleges of their choice, whether public or private, secular or religious. The *War Orphans' and Widows' Educational Assistance Act*[48] provides for subsistence, tuition, etc. for widows and chil-

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[43] *Cf. id.* at 16-18; *Board of Education* v. *Allen*, 392 U.S. at 243-44.

[44] Section 2's relationship is strictly one of taxpayer and state. *See infra*, pp. 35-36; BA, p. 26a.

[45] Chief Justice Burger repeated the same thought in the lead opinion in *Tilton* v. *Richardson*. *See* 403 U.S. at 678.

[46] 38 U.S.C. ch. 34.

[47] 20 U.S.C. ch. 17.

[48] 38 U.S.C. § 1700 *et seq.*

dren of persons in the armed forces who die of service-connected disabilities, regardless of whether the tuition is at public or private educational institutions. The *New York State Regents Scholarship Program*[49] provides 19,500 scholarships annually to apply toward tuition at any public or nonpublic post-secondary school, regardless of religious affiliation, with the amount of the scholarship varying depending on the income of the student's family. The *New York State Scholar Incentive Program*[50] authorizes grants to students attending any public or nonpublic post-secondary school, regardless of religious affiliation, provided the student meets specified academic standards, with the amount of the grant varying, depending on the income of the student's family. The *Elementary and Secondary Education Act of 1965*[51] provides funds to local educational agencies to meet the special educational needs of children from low-income families; authorizes grants for acquisition of school library resources, textbooks and other instructional materials for the use of children and teachers in both public and private elementary and secondary schools; and authorizes grants for supplementary educational centers and services. The *Legislative Reorganization Act of 1946*[52] provides that pages in the Senate, House of Representatives and this Court may be educated either in the public schools of the District of Columbia or in "a private or parochial school of their own choice," the cost thereof to be borne by the United States Treasury.

The principal or primary effect of these various statutes is certainly not to advance religion. Rather, it is to nurture a more pluralistic society by meeting the special

[49] N. Y. Educ. Law § 601.

[50] N. Y. Educ. Law § 601-a.

[51] 79 Stat. 27.

[52] 2 U.S.C. § 88a.

needs of certain groups, such as veterans, war-orphans, low-income families, even pages in Congress and this Court, for financial assistance in obtaining an education. We submit that Section 2 has a similar principal or primary effect.

Absence of Entanglement Between Church and State

The third constitutional test set forth in *Lemon* v. *Kurtzman* and *Tilton* is whether a statute fosters "excessive government entanglement with religion."

This Court has recognized: "No perfect or absolute separation [between religion and government] is really possible; the very existence of the Religion Clauses is an involvement of sorts—one that seeks to mark boundaries to avoid excessive entanglement." *Walz* v. *Tax Comm'n of the City of New York*, 397 U.S. at 670. "In order to determine whether the government entanglement with religion is excessive, we must examine the character and purposes of the institutions which are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and religious authority." *Lemon* v. *Kurtzman*, 403 U.S. at 615. But, "[n]o one of these three factors standing alone is necessarily controlling," *Tilton* v. *Richardson*, 403 U.S. at 688 (Burger, C.J.); it is their combination which is decisive.

In *Walz*, this Court found that tax exemptions for church-owned properties resulted in "... only minimal and remote involvement ... far less than taxation." 397 U.S. at 676. In *Tilton*, this Court found that a federal statute providing construction grants for secular-purpose buildings at religiously-affiliated colleges and universities did not foster excessive entanglement with religion for several reasons, including the absence of any need for "intensive government surveillance." 403 U.S. at 687.

On the other hand, the Rhode Island and Pennsylvania statutes providing for state payment of the salaries of teachers of secular courses in nonpublic schools were invalidated because of the need for extensive probing by the state into the internal affairs of the schools to ensure that the state funds were being used only for secular teaching. This Court stated in *Lemon* v. *Kurtzman* with respect to the Rhode Island statute:

> A comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that these restrictions are obeyed and the First Amendment otherwise respected. Unlike a book, a teacher cannot be inspected once so as to determine the extent and intent of his or her personal beliefs and subjective acceptance of the limitations imposed by the First Amendment. These prophylactic contacts will involve excessive and enduring entanglement between state and church. 403 U.S. at 619.

And with respect to the Pennsylvania statute:

> In particular the government's post-audit power to inspect and evaluate a church-related school's financial records and to determine which expenditures are religious and which are secular creates an intimate and continuing relationship between church and state. 403 U.S. at 621-22.

Tested by these criteria,[53] there is and can be no involvement in or entanglement with religion on the part of the state under Section 2, let alone an excessive degree thereof. There is no provision in Section 2 which entails either a direct or an indirect relationship between the state and the various nonpublic schools. The statute states that "[i]n order to be eligible for tuition reimbursement . . . the *parent* of the pupil shall . . . file with the commissioner a verified

[53] As stated above at p. 28, the District Court did not specifically apply the entanglement test to Section 2.

statement, in such form as he shall provide . . ." N.Y. Educ. Law § 562.2, BA, p. 11a; JSA, p. 65a (emphasis added). A copy of the prescribed form is appended hereto, page 25a. Furthermore, if any auditing of such statements is deemed necessary by the Commissioner of Education, Section 2 provides that it be carried out by comparing the parent's records on file with the State Tax Commission. *See* N.Y. Educ. Law § 562.4, BA, pp. 11a-12a; JSA, pp. 65a-66a.

In addition, both the legislative and subsequent history of Section 2 belie any potential for political divisiveness along religious lines. Then again, there has been no such undesirable phenomenon with respect to any of the other, older federal and state enactments relating to tuition and other educational assistance cited above, pages 32-33.

SEVERABILITY IS NOT A GENUINE ISSUE HEREIN

Chapter 414 is an omnibus statute, and it contains a specific severability clause, Section 11. *See* BA, p. 24a; JSA, p. 78a. The District Court majority, relying upon this Court's decisions in *Tilton*, 403 U.S. at 683-84, and *Champlin Refining Co.* v. *Corporation Commission of Oklahoma*, 286 U.S. 210, 234 (1932), held Sections 3-5 of Chapter 414 to be separable from Sections 1 and 2 (and 6-10). Indeed, a review of Chapter 414 not only reveals its omnibus nature, but, more importantly, that each of the substantive parts of the statute stands alone and could have been enacted as a separate law without modification.[54] Then again, even if the parts of a given statute are not independent of each other, as was true in *Tilton*, "[t]he cardinal principle of statutory construction is to save and not to destroy." *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937).

[54] Judge Hays's speculation in dissent with respect to the reason for enactment of Sections 3-5 of Chapter 414 [*see* 350 F.Supp. at 676; JSA, pp. 44a-45a] is not supported by the record in this case.

Conclusion

Sections 2 through 5 of Chapter 414 of the 1972 Laws of New York are constitutional in all respects. The District Court's judgment with regard to Sections 3, 4 and 5 should therefore be affirmed, and the judgment with regard to Section 2 should therefore be reversed with a direction to the District Court to dismiss the complaint with respect to Section 2.

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Respectfully submitted,

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